IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1287 OF 2006
IN
SUIT NO. 1124 OF 2006

Atul V. Kantharia & Anr. ..Plaintiffs

versus

Jayshree Jaydev Bhatt & Ors. ..Defendants

Mr. Shailesh Thakkar i/b. M/s. Sailesh Thakkar & Co. for the Plaintiffs.

Mr. M. P. Vashi for the Defendant Nos.1 and 2.

Mr. P. S. Shah for the Defendant No.3.

CORAM : S. J. VAZIFDAR, J.

DATE : 11TH SEPTEMBER, 2007

P.C.

1. The suit is filed for a declaration that the Plaintiffs are the absolute owners of a suit flat and that Defendant Nos. 1 and 2 have no right therein and/or in the flat in the new building to be constructed by Defendant No.3 in lieu of the original flat. The Plaintiffs have also sought an order for possession of the suit flat. The Notice of Motion is filed for a Receiver and Injunction in

respect of the suit flat.

2. The Plaintiffs are the brothers of the Defendant No. 1, Defendant No.2 is the husband of the Defendant No.1. Defendant No.3 is a Developer.

3. The father of the Plaintiffs and Defendant No.1 and the Plaintiffs were shown as joint owners in the share certificate of the society in which the suit flat is situate. The Plaintiffs rely upon a Will dated 7.12.1994 of their father bequeathing inter alia the said flat to them alone. The Plaintiffs have also relied upon a letter dated 1.5.2001 addressed by the father to the society in which it is stated that the said flat was permitted by him to be used by his daughter - Defendant No.1 gratuitously for about a period of two years only. The letter clarifies that no interest is created therein by way of lease or rent or otherwise. Admittedly, the electricity bills and the bills for the Society's outgoings are raised in the name of the Plaintiffs. The Plaintiffs' father expired on 29.12.2005. Thereafter, correspondence was exchanged between the parties, in the course of which the Defendants inter alia contended that they

are entitled to the flat by way of adverse possession.

4. In the Affidavit in Reply the plea of adverse possession has not been taken.

5. The Plaintiffs have applied for probate of the said Will dated 7.12.1994. Assuming that the Will is not probated and it is held that the Plaintiffs' father had expired intestate, Defendant No.1 would have only a 1/7th share therein. The plaintiffs rights therefore require to be protected.

6. On behalf of the Defendants, it is contended that the suit is not maintainable. As far as the prayer for possession is concerned, the contention prima facie cannot be said to be without substance as possession would follow only upon the Plaintiffs succeeding on the ground that Defendant No. 1 is a gratuitous licensee. In view of the Judgment of the Full Bench of this Court, a plausible defence is made out. It may however be possible for the Plaintiffs to contend that as far as the new flat is concerned, that plea is not available.

7. In this view of the matter, while it is necessary to protect the rights of the plaintiffs, I do not consider it a fit case for appointment of a Court Receiver.

8. In the circumstances, the Notice of Motion is made absolute in terms of prayer (a).

9. It is made clear that by this order, no directions have been passed against Defendant No.3 who is at liberty to act in accordance with law. It is also clarified that the refusal of the other interim reliefs sought, will not preclude the Plaintiffs from adopting appropriate proceedings for the same.